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W. B. Kegley, of Wytheville, *R. I. Roop*, of Christiansburg, and *J. E. Proffit*, of Floyd, for plaintiffs in error.

C. B. & H. M. Moomaw, of Roanoke, and *R. F. Tompkins*, *G. W. Agnew, Sowder & Burwell*, and *B. G. Howard*, all of Floyd, for defendant in error.

WYGAL *v.* WILDER et al.

Sept. 9, 1915.

[86 S. E. 97.]

1. Highways (§ 59*)—Establishment—Proceedings in Circuit Court.—The report of viewers in proceedings to establish a road under General Road Law (Acts 1904, c. 106) § 5 (Code 1904, § 944a), as amended by Acts 1910, c. 162, is properly received in evidence in the circuit court, though the matter is there heard de novo.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 199; Dec. Dig. § 59.* 12 Va.-W. Va. Enc. Dig. 864.]

2. Highways (§ 58*)—Establishment—Proceedings in Circuit Court—Evidence.—The admission in evidence in proceedings in the circuit court for the establishment of a public road under General Road Law, § 5, as amended by Acts 1910, c. 162, that the applicants for the road would grade and construct it at their own expense, was not prejudicial to a landowner.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 177-198, 200-203; Dec. Dig. § 58.* 12 Va.-W. Va. Enc. Dig. 873.]

3. Highways (§ 59*)—Establishment—Proceedings in Circuit Court—Evidence.—The judgment of the board of supervisors establishing a public road in proceedings therefor is a part of the transcript of the record certified up to the circuit court, and it is not error to allow the judgment to be read to the jury in the circuit court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 199; Dec. Dig. § 59.* 12 Va.-W. Va. Enc. Dig. 864.]

4. Highways (§ 53*)—Establishment—Cost of Construction—Obligation of Applicants.—Where applicants for the establishment of a public road are willing and able to pay for the cost of constructing it, the board of supervisors may allow them to do so.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 155-164; Dec. Dig. § 53.* 12 Va.-W. Va. Enc. Dig. 872.]

5. Trial (§ 260*)—Instructions—Refusal of Instructions Covered by Charge Given.—It is not error to refuse a requested instruction substantially covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.* 7 Va.-W. Va. Enc. Dig. 745.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Appeal from Circuit Court, Lee County.

Application by W. R. Wilder and another for the establishment of a public road over the lands of M. B. Wygal and others. There was an order of the circuit court establishing the road, and M. B. Wygal appeals. Affirmed.

Pennington Bros., of Pennington Gap, for appellant.

Duncan & Cridlin, of Jonesville, and *J. C. Noel*, of Pennington Gap, for appellees.

VIRGINIA RY. & POWER CO. *v.* McDEMMICK.

Nov. 11, 1915.

[86 S. E. 744.]

1. Trial (§ 203*)—Instructions—Theories of Case.—Where there are two conflicting theories of a case, one supported by plaintiff and the other by defendant, and the theory of one party has been presented by instructions, the other party is entitled to an instruction presenting the principles of law applicable to his theory, provided there is evidence sustaining it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.* 7 Va.-W. Va. Enc. Dig. 704.]

2. Carriers (§ 280*)—Carriage of Passengers—Care Required.—A carrier must exercise the highest degree of care and diligence in guarding the safety of its passengers, and the slightest imputation of negligence against which human care and skill can provide makes it responsible for any defect of machinery or any negligence of its servants, warranting a recovery for an injury to a passenger proximately resulting therefrom, but it is not an insurer of the safety of its passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.* 2 Va.-W. Va. Enc. Dig. 700.]

3. Carriers (§ 284*)—Carriage of Passengers—Care Required.—A carrier must protect its passengers against violence of its servants or other passengers and strangers, when such violence may be reasonably expected and prevented, but it is not liable for damages where it is not shown that it had notice of any acts justifying the expectation that a wrong would be committed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127-1135, 1173, 1222; Dec. Dig. § 284.* 2 Va.-W. Va. Enc. Dig. 700.]

4. Carriers (§ 321*)—Injuries to Passengers—Evidence—Instructions.—Where, in an action for injury to a street car passenger kicked by a negro passenger, the theory of the case of the carrier was that

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.